U.S. Postal Service *and* American Postal Workers Union, Dallas Area Local, AFL–CIO. Case 16–CA–22781

April 30, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

On October 31, 2003, Administrative Law Judge Michael A. Marcionese issued the attached decision. The Respondent filed exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions[1] and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders the Respondent, U.S. Postal Service, Coppell, Texas, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The Respondent filed no exceptions to the judge's finding that it violated Sec. 8(a)(5) and (1) of the Act by failing timely to furnish the Union with information in its request #3, including a list of employees who took the 725 exam on April 18, 2003.

The General Counsel filed no exceptions to the judge's dismissal of the allegations that the Respondent violated Sec. 8(a)(5) and (1) by refusing to furnish the Union with copies of Janet Marsh's medical records, her workers' compensation claim, and supporting documentation.

[2] The judge found that the Respondent violated Sec. 8(a)(5) and (1) of the Act by failing to timely and expeditiously furnish the Union with its requested information regarding a sexual harassment investigation. The Respondent argues in exceptions that it had no duty to provide the information and that, in any event, its delay in providing the information was reasonable under the circumstances. We find it unnecessary to pass on this 8(a)(5) allegation because it is cumulative of an uncontested finding by the judge that the Respondent failed timely to satisfy a separate information request. A finding in this regard therefore would not affect the remedy.

Dated, Washington, D.C. April 30, 2004

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Michael D. Rank, Esq., for the General Counsel.
April L. Smith, Esq., for the Respondent.
Paul Manley, Chief Steward, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MICHAEL A. MARCIONESE, Administrative Law Judge. I heard this case in Ft. Worth, Texas, on September 22–23, 2003. American Postal Workers Union, Dallas Area Local, AFL–CIO (the Union) filed the charge on May 8, 2003, and amended it on June 6 and July 23, 2003.[1] Based on the amended charge, the Board's Regional Director issued the complaint on August 28 alleging that the Respondent, United States Postal Service, violated Section 8(a)(1) and (5) of the Act by failing and refusing, since April 22, to furnish certain information requested by the Union and by failing to furnish other information requested by the Union in a timely manner. On September 11 the Respondent filed its answer to the complaint denying the alleged unfair labor practices and asserting several affirmative defenses, including the claim that the Respondent could not comply with the Union's request for certain of the information because of the federal Privacy Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent provides postal services for the United States and operates various facilities throughout the United States in the performance of that function, including the facility located in Coppell, Texas, which is the subject of this proceeding. The Board has jurisdiction over the Respondent in this matter by virtue of the Postal Reorganization Act, 39 U.S.C. Section 1209(a) (PRA). The Respondent admits and I find that the Charging Party and its parent, American Postal Workers Union, AFL–CIO (National Union), are labor organizations within the meaning of Section 2(5) of the Act.

[1] All dates are in 2003 unless otherwise indicated.

II. ALLEGED UNFAIR LABOR PRACTICES

The National Union has represented a unit of the Respondent's employees on a nationwide basis since at least 1971. The Charging Party Union has been delegated the authority to represent unit employees within its geographic jurisdiction, including the unit employees at the Coppell, Texas facility involved in this proceeding. The Respondent and the National Union are parties to a collective-bargaining agreement which, through an extension, is effective through November 20, 2004. Article 31.3 of the Agreement incorporates the Respondent's statutory duty to furnish information to the Union into the contract.

The dispute which led to the instant unfair labor practice charge and complaint arose in the Respondent's time and attendance control system (TACS) office at the North Texas mail processing and distribution facility in Coppell. The TACS clerks in that office are part of the unit represented by the Dallas Area Local. Paul Manley, a 30-year employee and longtime union officer, was one of the 10 clerks working there in the summer-fall 2002. At the time, there was no certified steward for these employees. If an employee in the TACS office had a grievance, they would have to call the local union, which would then designate one of the certified stewards from the workroom floor to represent the employee. Manley did not become the certified steward for the TACS office until March 2003.

Janet Marsh was one of two women employed in the TACS office in 2002. She was a member of the bargaining unit. There is no dispute that Marsh initiated a sexual harassment complaint in about September–October 2002. Her complaint involved allegations that male employees in the office, including Manley, had created a hostile environment by use of profane and sexual language. It is also undisputed that the Respondent launched a formal investigation into Marsh's complaint in about November 2002, which involved the creation of an investigative team comprised of employees from the human resources' office, the conduct of interviews, and the filing of written reports in early 2003. The record reveals that the investigators attempted to interview Manley in December 2002 and January but that he declined to participate in the investigation. Although no formal discipline resulted from the investigation, it is undisputed that one employee who was the subject of Marsh's complaint, and who had been on detail in the TACS office, had his detail terminated in December 2002. Manley testified that the employees in the TACS office were also required to view a training video on sexual harassment and sign a statement certifying that they understood the law regarding sexual harassment. The record reveals that Marsh also filed a formal complaint of discrimination with the EEO office which was still pending at the time of the hearing.

Manley testified, without dispute, that Marsh called in sick around Christmas 2002, after the investigation had started, and that she did not return to work until the first week in April. According to Manley, when Marsh returned she was working only 4 hours a day, 5 days a week, a modified work schedule. There is no dispute that Marsh had claimed a work-related injury resulting from the alleged hostile work environment and that her claim was being investigated by the U.S. Department of Labor Office of Worker's Compensation Programs (OWCP), which administers the Federal employee workers' compensation laws. Manley also testified, without dispute, that the Respondent detailed three female employees to work in the TACS office in January, after the detail of the male employee accused of harassment had been terminated. By the time Marsh returned to work, Manley had been appointed the union's steward with responsibility for representing the employees in the TACS office.

On April 22, Manley submitted to Sheila Herrera, the acting supervisor in the TACS office, three "Requests for Information & Documents Relative to Processing & Grievance" (sic) on forms approved for that purpose. The preprinted language on the form stated that Manley was requesting the information "in order to properly identify whether or not a grievance does exist and, if so, their relevancy to the grievance." The first request, which will be referred to as information request #1, identified the grievant as "Class Action" and cited article 30 in the space to describe the "Nature of Allegation".[2] By this request, Manley sought:

> A copy of all medical information relating to Janet Marsh. A copy of any claims filed for workers compensation, supporting documentation and response from Department of Labor. All documentation from USPS supporting or not supporting Mrs. Marsh claim.

The second request, herein information request #2, also identified the grievant as "Class Action." Manley cited article 2 for "Nature of Allegation."[3] In this request, Manley sought:

> All documents relating to the investigation of Sexual Harassment and creating a Hostile Work Environment. This will include all documents made by alleging parties. All documents issued or received in Labor Relations Office, all documents obtained or issued by appointed Fact Finding Team. This will also include any documents relating to discipline issued to any of the parties involved.

The third request, information request #3, identified the grievant as "APWU" and cites article 37 for "Nature of Allegation."[4] Here, Manley sought:

> A list of all employee's who submitted a bid for position #7175063 vacated by C.A. Harper on 11/29/02. A list of all employee's (sic) tested on the 725 examination on April 18, 2003.

Harper was the other female employee in the TACS unit at the time of Marsh's complaint.

On receipt of Manley's information requests, Herrera forwarded them to three individuals who appeared to her to have responsibility for the documents requested, i.e. Denise Cameron, manager of human resources; Charles McAtee, manager

[2] Article 30 of the collective-bargaining agreement is entitled "Local Implementation" and describes the local agreement process, setting forth 22 specific items which may be the subject of local bargaining.

[3] Article 2 is the contract's nondiscrimination provision.

[4] Article 37 is the section of the contract containing provisions specific to the clerk craft. This lengthy article contains, inter alia, provisions governing seniority and job posting and bidding procedures.

of labor relations, who reports to Cameron; and Dr. Patricia Auerbach, head of the medical unit. Cameron answered the first two requests herself, checking the box for "Request Denied." As to request #1, Cameron wrote, as her reason for denying the request, "only employee can get a copy." Her written reason for denying request #2 was, "only alleged victim can receive a copy of file." Cameron signed and dated the forms on April 28. The forms were mailed to the Union's office in Dallas by certified mail. Although the return receipts establish that the denial of these two requests were received by the Union on May 2, Manley testified that he did not see them until sometime in late May. McAtee responded to Manley's request #3 by checking the box "Request Approved" on April 30. The complete bid list was sent to the Union, also by certified mail. Although received in the Union's office, Manley did not physically receive this information until late May. On May 22 Cameron responded to that portion of the request #3 seeking the exam list by writing the following on a copy of the information request:

> There is no 725 examination currently listed in our system. Mr. Manley will need to be more specific on what exam he is referring to and the purpose he needs the information.

Attached to the form is a computer-generated message that "Test 725 is not defined in the system." This response was also mailed to the Union's office and received on May 27. Manley received it shortly thereafter.

Manley testified that, on May 1, not having received any response to his three requests, he resubmitted them, writing on copies of his original requests, "second request." According to Manley, when he gave the requests to Herrera a second time, she told him that she would give them to Randy Johnson. Johnson had been the supervisor in the TACS office when Marsh made her complaints but had been promoted to an acting position higher up in management. Manley testified that Johnson came to him later the same day, May 1, and told him that he had spoken to McAtee and that McAtee promised to put the information in the mail. A handwritten note to that effect appears on Manley's copy of his second request. Manley testified further that the only thing he received after this was a routing slip dated May 1 from Judia Sarich, occupational health nurse administrator, to Cameron, McAtee, and Freddie Evans, injury comp, referring to his requests for information and stating:

> We cannot accept these documents. I have attached the proper document that needs to be completed in order to obtain copies of documents from "Restricted Medical Records."
>
> They will need to be very specific regarding what documents they are requesting, and the employee must sign the document giving permission for us to release information from their file.

According to Manley, he received this memo with the attached form on May 6 or 7. He received this response through the local union office where it had been mailed. Manley did not fill out the form attached to the memo.

On May 8 Manley filed the initial charge in this case. Only after filing the charge did he see Cameron's response denying his first two requests for information, her explanation for the missing exam list, and the bid list furnished by McAtee. During the investigation of the charge, the Respondent submitted three position statements, which are in evidence, and furnished additional information to the Union. As will be explained in more detail below, the only information that had not been furnished to the Union at the time of the hearing was Marsh's medical records and information related to her OWCP claim.

In its first position letter, dated May 23, the Respondent merely reiterated the positions taken by Cameron in her initial responses to Manley's request. In response to a request from the Board's Regional Office, the Respondent submitted a more detailed position statement on June 24. In this letter, the Respondent, for the first time, cites its internal policy regarding the disclosure of employee medical records, a management instruction identified as EL–860–98–2. The Respondent defended its refusal to provide records regarding Marsh's sexual harassment complaint by citing another internal policy, publications 552 and 553, the manager's and employee's guide to understanding sexual harassment, respectively. The Respondent, in the position letter, acknowledged its obligation to bargain with the Union for an accommodation of the Union's needs and the confidentiality concerns where such records are relevant to the Union's position as bargaining representative. Finally, the Respondent stated that the exam list, which it previously stated did not exist, had been found and was being furnished to the Union. Manley testified that he did not receive the exam list until late July.

The management instruction regarding employee medical records was adopted to comply with the federal Privacy Act. The policy set forth in the instruction is that employee medical records are confidential and may be disclosed only in certain limited instances and to certain specified parties. The policy sets forth the procedure for disclosing "restricted medical information," such as an employee's medical file (EMF), to persons who may have access to this information. Included among the category of authorized requesters is "collective bargaining representatives." The policy with respect to union representatives is as follows:

> [A]uthorized union representatives, acting on behalf of the employee in an official union capacity: The representative must demonstrate that the information sought is relevant and necessary to collective bargaining. Medical personnel must ask the Labor Relations official to assist in a joint decision of relevance and necessity.
>
> (a) In certain cases, employee medical records may be provided without an employee's authorization to a postal union official under the collective-bargaining agreement to which the Postal Service is a party. Requests from postal union representatives without an employee's authorization must be carefully reviewed. Information that is relevant and necessary to collective bargaining is available to an authorized representative *only when acting officially.*
>
> (b) When a union representative submits a request to inspect an employee's restricted medical records without the employee's authorization, the installation head should instruct the appropriate Labor Relations official to obtain

specific answers from the union representative to the following questions (if not provided in the request letter):

- What is the precise bargaining issue, grievance, or contemplated grievance involved?
- Why does the Union claim that the information sought is relevant and necessary to resolving the issue or dispute?

(c) If the union representative provides a response to the above questions that the Labor Relations official believes to be inadequate, the installation head should be advised to deny the request.

(d) If a union representative provides sufficient response and the Labor Relations official and medical personnel agree that the medical information is relevant and necessary, the official will forward the union request to the medical facility where the record is maintained for disclosure.

(Emphasis in original.) The management instruction contains, as an attachment, the same form that was sent to Manley by nurse Sarich on May 1.

The manager's guide to understanding sexual harassment also emphasizes the confidentiality of information received from an employee who files such a complaint. However, the guide acknowledges that it may be necessary to disclose information, including the identity of the complainant, to other parties in the course of an investigation and directs supervisors and managers to advise complainants of this possibility. The employee's guide to sexual harassment also advises employees that the Respondent "will protect the confidentiality of harassment complaints to the extent possible."

The internal management policies cited by the Respondent in its June 24 position statement, while highlighting the confidential nature of the information sought by Manley, do provide for disclosure of this information to union representatives in certain circumstances. It thus appears that Cameron's initial response to the Union on April 28, i.e., that only Marsh could get a copy of her medical records, workers' comp file, and sexual harassment investigation file, was erroneous. In her testimony at the hearing, Cameron conceded that she had been mistaken in her initial response.

On July 3 after additional discussions between the Respondent's legal department and the Board's investigator, the Respondent furnished to the Union part of the record from the investigation into Marsh's sexual harassment complaint. The document furnished was a March 20 "Addendum" to an earlier report submitted by the investigators. Upon receiving this document, Manley questioned why he did not receive the initial January 20 report referred to in the addendum. By letter dated July 14, additional information related to Marsh's complaint was furnished, including the initial January 20 report. The letter indicated that Cameron was still checking whether any decision had been rendered in the investigation. The Respondent's representative stated that she would advise the Board agent if more information was available. No further information related to the sexual harassment complaint and its investigation had been furnished by the close of the hearing.

Manley testified that, also in July, he was told by the Board agent investigating his charge, that the Respondent wanted him to fill out a specific form to get the medical information on Marsh. Complying with this request, Manley submitted, on July 10, a form designated as "Disclosure of Information About Employees to Collective Bargaining Agents." This form, which is designed to document such disclosures under the Privacy Act, is a different form than the one nurse Sarich sent Manley on May 1. On the form he submitted on July 10, Manley wrote "grievance processing" as the purpose of his request. At the same time, Manley submitted another information request on the same form he used for the first three requests. This new request sought "a copy of the interview notes (Q&A) that were taken from [three named employees] in the fact finding investigation initiated by Human Resource Manager Denise Cameron and conducted by Rita Murray and Alfredo Varela." The request is signed by the three employees whose interview notes were sought.

On July 10 or 11, Manley met with McAtee, in McAtee's office at his request. During this meeting, which Manley recalled lasting about 45 minutes, McAtee asked him why he needed the information. Manley testified that he explained to McAtee that he needed the information to investigate potential grievances, including issues relating to Marsh's being placed in a light or limited duty work assignment on her return to work. On cross-examination, Manley admitted that he did not tell McAtee that he also needed the information to investigate a possible reverse discrimination grievance. Manley recalled that McAtee's discussion was primarily focused on the Union's need for the exam list, which the Respondent had already provided.[5] At the conclusion of this meeting, according to Manley, McAtee said he understood why the Union needed the information. Manley recalled that McAtee promised to get him the information. Instead of the information, Manley received a letter from McAtee, dated August 21, responding to the July 10 submissions. In the letter, McAtee asks Manley for

> a written response stating the relevance of the information requested. For example, has any of the alleged harassers received discipline? How does the information you requested support the grievance you are filing? What specific time period is involved regarding the request for medical information?
>
> Not withstanding (sic) the above, you can be provided the above stated medical information, if Mrs. Marsh signs an authorization for release of medical information. Referencing your request for the Fact Finding Investigation, Paralegal, Lynda Hunter of the Southwest Area Law Office mailed two summaries of the Fact Finding Investigation to the APWU in July of 2003. Records reveal that K. Curry received the above cited copies on July 7, 2003 and July 16, 2003.

Manley admitted that he did not respond to McAtee's letter.

[5] Although Manley claimed that he did not see the exam list until late July, he conceded that the list had been received in the Union's office before this.

McAtee testified for the Respondent and contradicted Manley's version of their meeting in July. McAtee recalled requesting this meeting in response to Manley's July 10 request for Marsh's medical records and for the fact-finding investigation reports. He told Manley at the outset that he did not have the fact-finding records, that they were in human resources under Cameron's jurisdiction. He then asked Manley why he needed all of Marsh's medical records. McAtee testified that Manley told him there was a violation of the local agreement regarding light duty assignments. McAtee told Manley he didn't see how all of her medical records would be relevant to that, while acknowledging that any documents relating to a light duty restriction might be. He told Manley he would look into the matter after the meeting and, if the records were relevant, he would do what he needed to do to get him the records. In contrast to Manley's testimony, McAtee testified that his focus was on the medical records, not the other information Manley had requested. McAtee, while acknowledging that Manley expressed that he was upset that the sexual harassment investigation had been conducted, did not recall Manley citing this as a reason for his request for Marsh's medical records. McAtee also did not recall Manley making any complaints about the procedures used in the investigation. McAtee testified that he sent the August 21 letter to Manley after this meeting after he reviewed the local agreement and could not see how Marsh's medical records would be relevant to any grievance under that agreement. McAtee was unable to explain why it took him more than a month to get back to Manley after the meeting and why he was still seeking a statement of relevance at that time after purportedly having met with Manley for the purpose of exploring the relevance of the requested information.

Manley testified that a series of events, beginning with Marsh's sexual harassment complaint, led him to make the requests for information at issue here within a month of his becoming certified as a steward at the North Dallas facility.[6] According to Manley, the Respondent never informed the employees in the TACS office who initiated the sexual harassment complaint, who had been accused of having engaged in sexual harassment, or the results of the investigation. Manley also claimed that, from his experience, the investigation was improper because the Respondent used management personnel, rather than the Postal Inspection Service, to conduct the investigation, and because the employees interviewed during the investigation were not permitted to have union representation during the interview.[7] Manley testified further that, in December, the employee whose detail had been terminated complained to him and expressed the belief that the sexual harassment complaint was the cause of this action. Manley claimed he could not do anything for the employee at the time because he was not the steward and was not in a position to request information to determine if the employee's concerns were justified.[8] In January, Manley's suspicions were further raised when the three female employees were detailed into the office, shortly after the male employee's detail had been terminated allegedly because there was no longer a need for him. Manley testified that the employees who were detailed had not yet passed the exam required to qualify for a TACS clerk position. According to Manley, there were male employees who had taken and passed the test who were eligible but were not given the detail. Around the same time, according to Manley, the supervisor, Randy Johnson, also told him that Marsh had filed an OWCP claim and indicated that the Respondent would contest it. During this period, in early 2003, another male employee who had been the acting supervisor was demoted and replaced by a female following a telephone conversation in which Marsh allegedly used a profanity when the acting supervisor told her she had to submit medical documentation for her leave. When Marsh finally returned to work on a modified work schedule, Manley believed that the Respondent was affording her preferential treatment because, in his experience, the OWCP had never before accepted a controverted claim so quickly. According to Manley, if Marsh's claim had not been accepted, it was improper for her to be working a light duty assignment because the joint light duty committee under the local agreement had not been consulted. All of these factors, many of which were based on hearsay or speculation on Manley's part, led him to believe that the Respondent was in violation of several contractual provisions and was engaging in reverse discrimination against the white male employees in the TACS office. According to Manley, he needed the information he requested on April 22 in order to investigate these potential grievances and determine whether to pursue the grievances. He believed that the information would prove his suspicions.

With respect to the specific items requested, Manley claimed that he needed Marsh's medical records and the information regarding her OWCP claim to investigate the modified work assignment she was given on her return to work. Manley testified that he also wanted access to her medical records to see what she told her doctors was the basis for her injury, to determine whether it was consistent with what the Respondent's investigators told the employees was the nature of the sexual harassment complaint. Manley hoped to show that her claims were false, in essence attacking her credibility. Manley testified he needed the records from the sexual harassment investigation to determine who made the complaint, what and whom they complained about, and whether the Respondent had drawn any conclusions as a result of the investigation. Finally, the bid and exam list were needed to investigate whether the Respondent was complying with contractual provisions for filling va-

[6] Manley was previously a certified steward at the main Dallas post office. He bid into the TACS clerk job in North Dallas in June 2002, but his certification apparently did not automatically follow him to the new facility.

[7] Although Manley acknowledged that he could have filed a grievance challenging the propriety of the investigation even before he became a steward, he claimed he didn't because he needed information to prove his grievance. I do not buy this. None of the information he requested related to the question of who should have conducted the investigation and whether union representation was required during the interviews.

[8] Manley did not explain why he did not refer this employee to the Union so that a certified steward could be assigned to represent his interests and pursue a grievance at that time. This testimony is an example of the self-serving nature of much of Manley's testimony in this case.

cant positions in the TACS office and whether the Respondent was discriminating against male employees in order to balance the number of male and female employees in that office.

Cameron, who as the manager of human resources for the Dallas District was ultimately responsible for responding to Manley's request for information, admitted that her initial response to requests #1 and #2 was not entirely correct. Cameron testified that she considered Marsh's medical records and the records relating to the investigation of her sexual harassment complaint to be confidential under the Privacy Act and the Respondent's internal policies. In addition, she claimed that the OWCP file was actually the property of the Department of Labor and that the Respondent was prohibited from releasing this information.[9] Cameron also cited the fact that Manley, the steward making the request, was one of the employees accused by Marsh as responsible for the hostile work environment. Cameron testified that she did not believe it would be appropriate to turn over such confidential information to him. Cameron noted that, at the time of Manley's request, Marsh also had a separate EEO complaint pending and she did not want to disclose information that would jeopardize the investigation of that complaint. Cameron testified further that, because no discipline resulted from the investigation of the sexual harassment complaint, the records related to the investigation were not relevant to the collective-bargaining agreement.[10] Cameron admitted that, in her shorthand denial of the first two information requests, she did not provide these reasons. Cameron also conceded that, despite her concerns, the records relating to the sexual harassment complaint were ultimately provided to the Union. According to Cameron, the disclosure of this information was a decision made by the legal department and did not reflect her own view of the confidentiality of these records. In response to questions from the General Counsel, Cameron acknowledged that she never offered to bargain with the Union to seek an accommodation of these confidentiality concerns and that she herself never asked the Union to for an explanation of the relevance of the documents requested. According to Cameron, she directed McAtee to do this when he met with Manley in July. As to Manley's request #3, Cameron acknowledged that McAtee approved the request on its face and promptly submitted the bid list. Although Cameron initially contended that the exam list was confidential and that Manley had to explain the relevance of this request, she conceded that the list was ultimately furnished to the Union without any accommodation or bargaining over confidentiality.

An employer's duty to bargain collectively under the Act includes the duty to furnish information, on request, which is relevant to and necessary for a union's performance of its duties as the employees' collective-bargaining representative. It is well established that this duty is not limited to contract negotiations but extends to requests, during the term of the contract, for information that is relevant to and necessary for contract administration and grievance processing. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967). Where the information sought by a union relates to the wages, hours and terms and conditions of employment of unit employees, it is deemed presumptively relevant. Although a showing of relevance by the union is required where it seeks information that does not directly pertain to unit employees, the Board has historically applied a liberal discovery-type standard in assessing relevance. *Postal Service*, 310 NLRB 391 (1993), and cases cited therein.

The Board and the courts have also held that a union's interest in arguably relevant information does not always predominate over all other interests. In *Detroit Edison v. NLRB*, 440 U.S. 301 (1979), the Supreme Court held that, under certain circumstances, confidentiality claims may justify a failure or refusal to provide otherwise relevant information to a union. When an employer raises a legitimate and substantial claim of confidentiality, the Board must balance the union's need for the information against the confidentiality interests established by the employer. The party asserting confidentiality has the burden of proving that such interests are in fact present and of such significance to outweigh the union's need for the information. *Exxon Co. USA*, 321 NLRB 896, 898 (1996), affd. mem. 116 F.3d 1476 (5th Cir. 1997). The Board has also held that an employer must timely raise and prove its confidentiality claim and must seek an accommodation through the bargaining process in order to satisfy its obligations under the Act. Id.

This case involves the Union's request for three types of information, only two of which raise confidentiality concerns. Because the Respondent ultimately furnished the information sought by requests #2 and #3, the only issue remaining as to those requests is whether the Respondent's delay in furnishing the information violated its statutory duty. With respect to the remaining information that has not been disclosed, i.e., Marsh's medical records and her OWCP file, the issues raised in this proceeding are whether the General Counsel has established the relevance of the information, and whether, if relevant, Respondent has met its burden of establishing a legitimate and substantial confidentiality interest in these records and has otherwise satisfied its obligations to the Union when such interests are at stake.

The Respondent argues that the information sought by request #1 is not relevant or necessary to the Union's statutory duties. The General Counsel contends that, because Marsh is a member of the bargaining unit, her medical records and OWCP records are "presumptively relevant." I disagree. Presumptive relevance typically applies to information such as the names, job classifications, wages, hours, benefits, etc. of unit employees. Such information essentially relates to those subjects over which the parties are required to bargain under Section 8(d) of the Act. An individual employee's medical condition, her consultations with her doctors and other personal information that would be contained in the files sought by the Union are not ordinarily the subject of negotiation between the parties to a collective-bargaining agreement. Such personal and private information only becomes relevant when it impacts the bargaining unit or requires application of a specific term of the contract. Because I find that Marsh's medical records and OWCP files are not presumptively relevant, the Union must demonstrate relevance.

[9] The Respondent made this claim for the first time at the hearing.

[10] Cameron did acknowledge that a male employee on detail to the TACS office was removed from the detail after Marsh filed her complaint.

The General Counsel, relying on the testimony of Manley, argues that the information is relevant to the Union's investigation of potential grievances over the handling of Marsh's sexual harassment complaint, her apparent assignment to modified work duties on her return from leave, and the complaints of reverse discrimination raised by white male employees. However, Manley did not indicate in his request that this is why he was seeking Marsh's medical records. The preprinted language on the request for information form, stating generally that information was being requested "in order to properly identify whether or not a grievance does exist and, if so, their relevancy to the grievance," was not sufficient to put the Respondent on notice why the Union needed to review personal medical information of an individual bargaining unit employee. Manley's identification of the grievant as "class action" and the nature of the allegation as "Article 30" did not further illuminate the basis for the request. If anything, it would make the relevance of these records even more obscure to the recipient of the request. Because the employee whose medical information was being sought by the Union was not identified as the grievant, the relevance to the Union of this personal information was not apparent on the face of the request. Similarly, the reference to article 30, "Local Implementation," which lists 22 diverse items that were subject to local negotiation, would leave the Respondent to speculate what potential grievance Manley was investigating. Only when Manley met with McAtee on July 10 or 11 did he provide any explanation to the Respondent to justify his request. Even then, Manley only cited a potential grievance over a light duty assignment as his reason for requesting this information.[11]

Under Board law, the fact that the Union did not adequately state the relevance of the information, or its need for it, does not excuse a failure by the Respondent to furnish the information. The Board has held that an employer, presented with a request for information whose relevance is not apparent on its face, has an obligation to seek clarification from the Union before denying the request. See, e.g., *Keauhou Beach Hotel*, 298 NLRB 702 (1990). Here, the Respondent did not ask Manley to demonstrate the relevance of Marsh's medical records until July 10, more than 2 months after the request was made and after the unfair labor practice charge had been filed. The Respondent's initial response to the request, to deny it outright without seeking an explanation of relevance, did not satisfy its obligations under the Act.

[11] I credit McAtee's testimony regarding this meeting over that of Manley. I note that Manley conceded on cross-examination that he did not tell McAtee, during this meeting, that he was also investigating possible "reverse discrimination," thus, corroborating McAtee. Manley's testimony that McAtee focused on his request for the exam list is patently incredible since the Respondent had already mailed the exam list to the union office before this meeting. Because the Respondent had also sent at least part of the information regarding the sexual harassment investigation to the Union before this meeting, it is clear that McAtee's focus was on Manley's request for Marsh's medical records. Finally, I note that Manley's demeanor, which was argumentative with opposing counsel and displayed a tendency to exaggerate, did not convince me that he was a generally credible witness in this matter.

The Respondent defends its denial of the Union's request #1, without seeking clarification as to the relevance and necessity of the information, by claiming that the information sought was confidential on its face and privileged from disclosure. The General Counsel argues that the Respondent's refusal to furnish Marsh's medical information and OWCP files is unlawful, notwithstanding any confidentiality interests in this information, because the Respondent did not timely raise its confidentiality concerns and did not offer to bargain with the Union for an accommodation. I disagree. Although Cameron may not have used the magic words "confidential" or "privilege" in her initial short-hand denial of the Union's request #1, her stated reason for the denial, that "only [the] employee can get a copy" of his medical records, implies that these records are confidential. Any reasonable person reading this response would understand that Cameron was asserting a privilege against disclosure. Similarly, when the nurse sent Manley a form for release of medical records on May 1, citing the management instruction covering release of medical records under the Privacy Act, it was clear that the Respondent was raising Marsh's confidentiality interests in her medical records as a basis for refusing to furnish this information.[12] Moreover, the entire course of the Respondent's dealings with the Union over this request made clear that it considered the information confidential. Thus, I find that the Respondent has timely raised a confidentiality interests in Marsh's medical records and records relating to her OWCP claim. I also find that these concerns are "legitimate and substantial." The Board and the courts have long recognized the sensitive nature of an individual employee's medical information. *Colgate-Palmolive Co.*, 261 NLRB 90, 93–94 (1982); *Johns-Manville Sales Corp.*, supra. See also *NLRB v. USPS*, 128 F.3d 280 (5th Cir. 1997); *New Jersey Bell Telephone Co. v. NLRB*, 720 F.2d 789 (3d Cir. 1983); *Norris Sucker Rods*, 340 NLRB No. 28, slip op. fn. 1 (2003).

Because the Respondent has timely raised a legitimate and substantial confidentially interest in the records sought by request #1, this interest must be balanced against the Union's asserted need for the information. In this case, if the Respondent modified Marsh's work assignment for medical reasons, records related to that decision would arguably be relevant. The Respondent offered no evidence to contradict Manley's testimony that Marsh was working a modified work assignment on her return from leave and that the Respondent had not followed the contractual provisions for placing an employee in such a position. Applying the liberal discovery standard applied by the Board in information cases, I find that the General Counsel has established arguable relevance for records related to Marsh's OWCP claim and the assignment of modified duties to her in early April.

In contrast, Manley's testimony regarding the relevance of Marsh's medical records in general, the first portion of request #1, does not meet the test of relevance. The sole reason Man-

[12] The Board has held that an employer faced with a request for employee medical information can assert the employee's confidentiality interests as a basis for not complying with the request. See *Johns-Manville Sales Corp.*, 252 NLRB 368 (1980). See also *Aerospace Corp.*, 314 NLRB 100 (1994).

ley gave in his testimony for requesting this information was to review doctors' reports to see if what Marsh told the doctors about her work environment was consistent with what the Respondent's investigators told Manley and the other employees was the basis of her sexual harassment complaint. Manley claimed he expected this information would prove that her complaint was false. Whether her complaint was false or not had no relevance to the Union at that time because the Respondent had not disciplined any employee for engaging in sexual harassment.[13] Allowing a union to obtain information for the purpose of attacking the credibility of a unit employee that the Union has a duty to represent fairly, where no other unit employee has been disciplined based on that employee's complaint seems contrary to the policies of the Act. Even assuming there was some relevance, or need, for the Union to attack Marsh's credibility, the request for "all medical information relating to Janet Marsh" went beyond anything that would be relevant to this issue.[14]

Balancing the legitimate and substantial confidentiality interests raised by the Respondent against the Union's asserted need for the information that was arguably relevant, I find that the confidentiality interests should prevail under the circumstances here. Although Manley testified at the hearing that Marsh's return to work with modified duties adversely affected unit employees, he offered no specific evidence to support this claim. His testimony was, at best, speculative. Because Marsh returned to the same job she held before her leave, she did not displace any employee. His claim that Marsh's modified schedule deprived other employees of overtime opportunities is based on his belief that she should not have returned to work at all. On the other side of the balance is the fact that Manley, the union official requesting the information, was one of the individuals accused by Marsh of creating the hostile work environment and that his request was not limited to those records that would be directly relevant to investigation of the apparent light or limited duty assignment. His broad request for all of her medical records, in light of his testimony at the hearing that he wanted these records to see what she told doctors examining her in order to essentially impeach the credibility of her sexual harassment complaint, demonstrates the vindictive motive behind Manley's request. It was apparent from his testimony that Manley was not so much interested in Marsh's light duty assignment as he was in going after her for having the audacity to file a complaint against him and the other white male employees in the TACS office. Considering the source of the information request, the overly broad nature of the request, its timing soon after Manley was certified as a steward and soon after the return of the complaining party to the TACS office, the Respondent was justified in attempting to protect the confidentiality of this employee's sensitive personal medical information.

Based on the above, I shall recommend dismissal of the complaint to the extent it alleges that the Respondent violated Section 8(a)(1) and (5) of the Act by failing and refusing, since April 22, to furnish the Union with the information sought in request #1.

As previously noted, the Respondent did furnish the Union, on July 3 and 14, with the information regarding its investigation of Marsh's sexual harassment complaint that was sought by the Union in request #2. The Respondent furnished this information notwithstanding the asserted confidentiality interest in such information and without seeking or obtaining any accommodation from the Union to protect these interests. By furnishing the information, the Respondent has essentially waived any confidentiality claims it might otherwise have.[15] The only issue remaining is whether the 2-1/2 months delay in complying with the Union's request was unlawful. In contrast to the Union's request for Marsh's medical records, the relevance of the information requested in request #2 was apparent on the face of the request. Manley cited the discrimination provision in the collective bargaining agreement and noted he was investigating a class grievance. Cameron clearly was aware that a sexual harassment investigation had been conducted in Manley's area because she was the one who convened the investigation in November. The Union, as the representative of the employees who had been questioned in the investigation, clearly had a need to know what transpired in the investigation. See *Postal Service,* 332 NLRB 635 (2000).[16] Yet, despite the clear relevance and need for the information, the Respondent denied the request with only a brief statement suggesting confidentiality as the reason for the denial. Moreover, the stated reason for the denial, that only the complainant can gain access to the file, was admittedly false. Then, 10 weeks later, with no change in the facts, the Respondent gave the Union the information. No explanation was given at the hearing for the abrupt change in course or for the delay in furnishing the information. Under these circumstances, I conclude that the delay was unreasonable and that the Respondent vio-

[13] Although the Respondent, in December 2002, had terminated the detail of one of the employees accused by Marsh of having created a hostile environment, that employee had not filed a grievance challenging this action. Although Manley could have referred this employee to the Local Union in December to investigate his concerns and pursue a grievance, he chose not to do so. The fact that Manley waited until he became the certified steward to "investigate" this matter suggests the true motive behind his request.

[14] I reject Manley's testimony that it was apparent from the face of his request that he was only seeking medical information related to Marsh's injury compensation claim. The second part of information request #1 specifically asked for this. There would be no reason to ask for "all medical information" if that was all he wanted. What is clear from the face of the request was that Manley indeed wanted access to Marsh's entire medical file.

[15] Although information regarding the identity of a sexual harassment complainant and other information obtained in the course of such an investigation is considered confidential under the Respondent's internal policies, these same policies recognize that this information may have to be disclosed and advise employees of this possibility. I do not find that the same confidentiality concerns exist with respect to this information that are present with respect to the medical records discussed above.

[16] The Board has held that charges or complaints filed against an employer by unit employees are not presumptively relevant and that a union must demonstrate the relevance of such information. *Polymers, Inc.,* 319 NLRB 26 fn. 2 (1995); Accord: *Maple View Manor, Inc.,* 320 NLRB 1149 (1996). I find that the Union has demonstrated relevance here.

lated Section 8(a)(1) and (5) of the Act, as alleged in the complaint, by failing to furnish this information in a timely manner. *Beverly Enterprises*, 326 NLRB 153, 157 (1998).

With respect to the Union's request #3, McAtee approved this request on April 28, soon after the request was received, and furnished the Union with the first part of the information requested, i.e., the bid list for the position vacated by employee Harper. The Respondent did not, at that time, raise any issue as to furnishing the remainder of the information, i.e., the 725 exam list. About 3 weeks later, the Respondent advised the Union that no such information existed with Cameron suggesting that Manley had to justify the relevance of this request. Then, after another month, and in the midst of the investigation of the unfair labor practice charge, the Respondent found and furnished the previously nonexistent exam list. Because the Respondent ultimately furnished this list without seeking any further demonstration of relevance and without pursuing any claim as to the confidentiality of the information, such claims have been waived.[17] The sole issue remaining is whether the Respondent's more than 2-months' delay in furnishing the information was unlawful. Because the Respondent offered no explanation why a list which purportedly did not exist was found to exist 2 months later and why it took so long to make this discovery, I must find that the delay was unreasonable and a violation of the Act. Accordingly, I conclude that the Respondent has violated the Act, as alleged, by failing to timely furnish the Union with the information sought by request #3. *Beverly Enterprises*, supra.

CONCLUSIONS OF LAW

1. By failing to timely furnish American Postal Workers Union, Dallas Area Local, AFL–CIO (the Union) with the following documents requested by the Union, the Respondent, United States Postal Service, has failed and refused to bargain collectively with the Union, and has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

(a) All documents relating to the investigation of sexual harassment and creating a hostile work environment, including all documents made by alleging parties.

(b) All documents issued or received in the labor relations office and all documents obtained or issued by the appointed fact-finding team, including any documents relating to discipline issued to any of the parties involved.

(c) A list of all employees who submitted a bid for position #7175063 vacated by C. A. Harper on 11/29/02.

(d) A list of all employees tested in the 725 examinations on April 18, 2003.

2. The Respondent has not failed and refused to bargain and has not engaged in any unfair labor practice in violation of Section 8(a)(1) and (5) by its failure and refusal to furnish the Union, on request, with the following.

(a) A copy of all medical information relating to Janet Marsh.

(b) Copies of any claims filed by Mrs. Marsh for workers compensation, supporting documentation, and any response from the Department of Labor.

(c) All documentation from United States Postal Service supporting or not supporting Mrs. Marsh's claim.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Because the Respondent has already furnished the information requested to the extent it would be required to do so under this decision, no further disclosure will be recommended. In *Postal Service*, 339 NLRB No. 150 (2003), the Board, noting the Respondent's history of violating Section 8(a)(5) in response to unions' request for information, issued a broad remedial order even though no party requested such a remedy. Because some of the cases cited by the Board in support of its finding that the respondent had a proclivity to violate the Act involved the untimely furnishing of information, similar to the violation found here, I shall recommend that a broad order issue in this case as well.

In *Postal Service*, supra, the Board also ordered a districtwide posting based on a history of similar violations committed by the Respondent's managers in the Houston District. In this case, there is no evidence of a similar pattern of violations affecting other postal facilities in the Dallas District. In addition, the unfair labor practices found here involve the request by a single steward for information limited to a dispute affecting one office within the North Dallas facility. Under these circumstances, a notice posting limited to that facility should be sufficient to remedy the violations found. Accordingly, I shall not recommend a districtwide posting here.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[18]

ORDER

The Respondent, United States Postal Service, Coppell, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with the American Postal Workers Union and its agent, the APWU Dallas Area Local, by failing or refusing to furnish requested information relating to unit employees in a timely and expeditious manner.

(b) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

[17] This information, i.e. a list of unit employees who took an exam for a vacant position under the terms of the contractual posting and bidding procedures, would be presumptively relevant. McAtee essentially conceded this. The Respondent has no "legitimate and substantial" confidentiality interests in such information which the Union clearly needed to ascertain whether the Respondent was adhering to the contract in the way it which it filled unit positions.

[18] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Furnish the APWU and its agent, the Dallas Area Local, in a timely and expeditious manner, with all information requested that is relevant to and necessary for the Union's performance of its functions as the statutory bargaining representative of the unit.

(b) Within 14 days after service by the Region, post at its facility in Coppell, Texas, copies of the attached notice marked "Appendix."[19] Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 22, 2003.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

[19] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Dated, Washington, D.C. October 31, 2003

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain collectively with the American Postal Workers Union (APWU) and its agent, the APWU Dallas Area Local, by failing or refusing to furnish requested information regarding unit employees in a timely and expeditious manner.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL furnish the APWU and its agent, the Dallas Area Local, in a timely and expeditious manner, with all information requested that is relevant to and necessary for the Union's performance of its functions as the statutory bargaining representative of the unit.

UNITED STATES POSTAL SERVICE